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SMALL MEDIUM ENTERPRISE DEVELOPMENT BANK MALAYSIA BHD v. ASCENDSYS SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
YUSRIN FAIDZ YUSOFF JC
[SUIT NO: WA-22M-156-09-2016]
B 22 MARCH 2024

Abstract – *While s. 6(3) of the Limitation Act 1953 provides 12 years to bring 'an action upon any judgment', the period in which they were allowed to 'execute' is limited up to six years, unless leave is obtained pursuant to O. 46 r. 2(1)(a) of the Rules of Court 2012 ('ROC'). The conditions under O. 46 r. 2(1)(a) of the ROC must be satisfied before the court grants leave. More importantly, there must be a valid excuse for the delay and there is no prejudice caused by reason of the delay.*

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LIMITATION: *Execution of judgment – Limitation of 12 years – Consent judgment – Period allowed for execution under O. 46 r. 2(1)(a) of Rules of Court 2012 – Whether limited up to six years unless leave obtained – Whether delay attributed to negotiation between parties – Whether plaintiff slept on rights – Whether other factors contributed to delay – Whether delay justified – Whether caused prejudice – Whether plaintiff retained right to seek leave to execute judgment – Limitation Act 1953, s. 6(3)*

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CIVIL PROCEDURE: *Judgments and orders – Execution of judgment – Consent judgment – Time limit to bring 'an action upon any judgment' by virtue of s. 6(3) of Limitation Act 1953 – Whether 12 years – Period allowed for execution under O. 46 r. 2(1)(a) of Rules of Court 2012 – Whether limited up to six years unless leave obtained – Whether delay attributed to negotiation between parties – Whether plaintiff slept on rights – Whether other factors contributed to delay – Whether delay justified – Whether plaintiff retained right to seek leave to execute judgment*

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G On 16 March 2017, the plaintiff recorded a consent judgment against the defendants wherein the defendants had jointly and severally agreed to pay the sum of RM5,490,109.87 as at 31 July 2016 with 1% *ta'widh* (compensation) per annum with effect from 1 August 2016, together with costs. The sum was to be paid in monthly instalments of RM300,000 commencing January 2017. The defendants defaulted in their instalments. The plaintiff thus filed a winding up petition against the first defendant. Based on the statutory notice dated 25 June 2020, issued pursuant to s. 465(1)(e) and s. 466(1) of the Companies Act 2016, the outstanding sum stood at RM2,658.858.69 as at 31 May 2019. The winding up petition was postponed as further negotiations towards settlement and partial payments were issued up till 11 November 2021. However, on 28 February 2022, the first defendant was wound up by

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another creditor, who prevailed in their winding up petition. Therefore, the plaintiff obtained an order absolute in a garnishee proceeding against the bank accounts of the second to fourth defendants, but only the aggregate sum of RM32,186.19 was able to be recovered. Subsequently, the plaintiff, who intended to file bankruptcy proceedings against the second, third, fourth and fifth defendants, realised that the six-year period for them to do so had expired on 15 March 2023. Hence, the plaintiff's application for leave to execute the consent judgment *via* encl. 24. The issue for determination of the court herein was with regard to the power of this court to allow such leave made pursuant to O. 46 r. 2(1)(a) of the Rules of Court 2012 ('ROC').

Held (allowing application in encl. 24):

(1) Although the plaintiff had 12 years to bring 'an action upon any judgment' by virtue of s. 6(3) of the Limitation Act 1953 ('LA'), the period in which they were allowed to 'execute' was limited up to six years unless leave is obtained pursuant to O. 46 r. 2(1)(a) of the ROC. The plaintiff, by filing the application for leave on 12 April 2023, was late by 28 days, which was also attributed by the first defendant negotiating a reduced instalment. The plaintiff should not be penalised for agreeing to an extension of time and consenting to a reduced instalment. The negotiations between the plaintiff and the first defendant were sufficient reasons for delay which justified the grant of leave to execute the consent judgment. (paras 20, 28, 29 & 32)

(2) The court took judicial notice of the COVID-19 pandemic and the imposition of the Movement Control Order ('MCO'), Conditional Movement Control Order ('CMCO') and Recovery Movement Control Order ('RMCO') which may have induced banks and financial institutions, including the plaintiff, to exercise greater leniency in terms of loan instalment or any repayment obligation. The MCO period also resulted in the extension of the statutory notice from the usual 21-day period to six months as per the Companies (Exemption) (No 2) Order 2020, which eventually resulted in the delay in the winding-up process initiated by the plaintiff against the first defendant *via* statutory notice dated 25 June 2020. Therefore, disallowing the plaintiff to enforce the consent judgment against the second to fifth defendants would not only unjustly deprive the plaintiff of their rightful recourse but would also enable the defendants to exploit the plaintiff's generosity and leniency. (paras 30 & 31)

(3) There was no prejudice that had occasioned, as the guarantors' debt had been reduced during the process of extended payment terms which were more favourable than the agreed terms within the four corners of the

consent judgment. The plaintiff's claim for interest on the judgment sum would also be limited up till the first six years based on s. 6(3) of the LA. Ultimately, there was no change in the position of the second to fifth defendants as they remained jointly and severally liable under the guarantee despite the winding up of the first defendant. (para 33)

(4) There was no truth in the allegation that the plaintiff had not taken any action upon obtaining the consent judgment in 2017. Upon discovering that the defendants were not adhering to the renegotiated instalments, the plaintiff took steps to enforce the same through winding-up and garnishee proceedings, *albeit* unsuccessfully. As the 2017 consent judgment remained valid until 2029, based on s. 6(3) of the LA, the plaintiff unquestionably retained the right to seek formal leave for its execution. (para 38)

Case(s) referred to:

A 'Court v. Cross [8231] 3 Bing 329 ***(refd)***

Bank Kerjasama Rakyat Malaysia Bhd v. Pertama Perdagangan Sdn Bhd & Ors [2019] 1 LNS 1784 HC ***(foll)***

CIMB Bank Bhd v. Teratai Sanjung (M) Sdn Bhd & Anor [2019] CLJU 1328; [2019] 1 LNS 1328 CA ***(dist)***

Dr Shamsul Bahar Abdul Kadir & Another Appeal v. RHB Bank Bhd [2015] 4 CLJ 561 FC ***(refd)***

Fong Tak Sing v. Credit Corporation (M) Bhd [1991] 1 MLJ 409 ***(refd)***

Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 CA ***(refd)***

Malayan Banking Bhd v. Chong Hin Trading Co Sdn Bhd & Ors [2012] 3 CLJ 499 HC ***(foll)***

Moez Ali Akbarally & Anor v. Public Bank Bhd [2021] 8 CLJ 20 CA ***(refd)***

Pacific Sanctuary Holdings Sdn Bhd v. Masaland Construction Sdn Bhd [2020] 4 CLJ 490 CA ***(dist)***

Public Bank Bhd v. Seato Trading (M) Sdn Bhd & Ors [1995] CLJU 326; [1995] 1 LNS 326 HC ***(refd)***

Public Islamic Bank Bhd v. Fadhil Husseiin Ishak Yassin Mansor; MS Citajaya Sdn Bhd (Proposed Intervener) [2023] 3 CLJ 102 HC ***(refd)***

Tamileswaaran Ravi Kumar v. Election Commission Of Malaysia & Anor [2023] 5 CLJ 983 HC ***(refd)***

Tio Chee Hing v. Chung Khiaw Bank Ltd [1981] 1 MLJ 227 FC ***(foll)***

Legislation referred to:

Companies Act 2016, ss. 465(1)(e), 466(1)

Limitation Act 1953, ss. 2(1), 6(3)

Rules of Court 2012, O. 46 rr. 2(1)(a), (3), 3(2), (3)

For the plaintiff - Farah Diana Addrus; M/s Sidek Teoh Wong & Dennis

For the defendants - Liew Teck Huat & Ong Kang Nyong; M/s Zaid Ibrahim Suflan T H Liew & Partners

Reported by S Barathi

JUDGMENT

Yusrin Faidz Yusoff JC:

Introduction

[1] This decision arises from the plaintiff's application for leave to execute a consent judgment dated 16 March 2017 ("the said consent judgment") even though six years or more has lapsed since the date of the judgment. The plaintiff's notice of application in encl. 24 is supported by an affidavit in encl. 25.

[2] The Senior Assistant Registrar had previously allowed encl. 24 on 10 May 2023 ("the initial extension order"). However, following an appeal by the second, third, fourth, and fifth defendants (D2, D3, D4 & D5), the order dated 10 May 2023 was set aside by me on 21 August 2023. In my ruling, I mandated a rehearing of the application. This is so as I found that although the plaintiff intended encl. 24 to be an *inter parte* application, they had failed to serve it on the defendants' solicitors. Consequently, I directed that encl. 24 be served onto the current solicitors of the defendants and that the defendants be granted the opportunity to submit the necessary affidavit in opposition (duly filed in encl. 69). Similarly, the plaintiff was granted the liberty to file their affidavit in reply (duly filed in encl. 70). On 24 July 2023, I additionally allowed an *ad interim* stay of the extension order of the said consent judgment pending the disposal of encl. 24.

[3] During the rehearing of encl. 24, the issues for determination were with regards to the power of this court to allow for such leave made pursuant to O. 46 r. 2(1)(a) of the Rules of Court 2012 ("the Rules").

Background

[4] On 16 March 2017, the plaintiff recorded a consent judgment against the defendants wherein the defendants had jointly and severally agreed to pay the sum of RM5,490,109.87 as at 31 July 2016 with 1% *ta'widh* (compensation) per annum with effect from 1 August 2016, together with costs of RM9,000. The said sum which is based on Islamic banking facilities granted to D1 is to be paid by way of the monthly instalments of RM300,000 commencing January 2017 till realisation. It is agreed that in the event that the defendants' default in the said instalments, the plaintiff would be at liberty to demand immediate payment of the outstanding sum. (exh SME-1 of encl. 25)

[5] As the defendants defaulted in their instalments, the plaintiff filed a winding up petition against D1 at the Shah Alam High Court (Petition No. BA-28NCC-186-04/2021 (exh SME-3 of encl. 25)). Based on the statutory notice dated 25 June 2020 issued pursuant to ss. 465(1)(e) & 466(1) of the Companies Act 2016, the outstanding sum stood at RM2,658.858.69 as at 31 May 2019. The winding-up petition was postponed as further negotiations towards settlement and partial payments were issued up till 11 November 2021.

[6] However, on 28 February 2022, D1 was wound up by another creditor, VNetwork System Sdn Bhd, which prevailed in their winding up petition *via* Shah Alam Companies Winding Up Petition No. BA-28NCC-521-11/2021 (exh SME-3 of encl. 25).

[7] On 22 December 2022, the plaintiff successfully obtained order absolute in a garnishee proceeding against the bank accounts of D2, D3 & D4 *via* a Writ of Execution No. WA-37G-164-08/2022. Nevertheless, only the aggregate sum of RM32,186.19 was able to be recovered from this execution process, (exh. SME-5 of encl. 25). The said sum was received by the plaintiff on 15 March 2023.

[8] The plaintiff intended to file bankruptcy proceedings against D2, D3, D4 & D5. Nevertheless, whilst preparing the cause papers they realised that the six-year period for them to do so have expired on 15 March 2023. (para. 11 of encl. 25).

[9] On 12 April 2023, the plaintiff applied for leave to execute the said consent judgment *via* encl. 24. At the time of filing encl. 24, the defendants still owed the plaintiff RM2,659,652.33. According to the plaintiff's certificate of indebtedness, the defendants had made payments totalling RM1,702,105.66 to the plaintiff (exh. SME-2 of encl. 25). This amount equates to the completion of six out of the 19 agreed-upon instalments.

Counsels' Contentions

[10] Plaintiff's learned counsel, Syed Fadzil bin Hashim Alhabshi sets out the following chronology which is culled from the plaintiff's written submission:

No.	Date	Event	Reference
1.	16.03.2017	Plaintiff recorded Consent Judgment	Encl. 25 Exh SME-1
2.	02.07.2018 till 30.10.2019	Defendant has been actively making payment to plaintiff and therefore plaintiff has suspendedall forms of execution based on the Consent Judgment	Encl. 70 Exh DBD-2
3.	18.03.2020	COVID-19 Period [Malaysian Movement Control Order]	-

4.	02.07.2020	plaintiff issued 465 Notice against D1 (6 months period for 465 Notice)	Encl. 70 Exh DBD-3
5.	20.04.2021	plaintiff filed Winding-up Petition at Shah Alam High Court	Encl. 25 Exh SME-3
6.	14.06.2021	D1 made payment of RM20,000.00 to the plaintiff	14.06.2021
7.	16.06.2021	D1 solicitor sent a letter to plaintiff requesting plaintiff to consider their proposal	Encl. 70 Exh DBD-4
8.	23.07.2021	plaintiff informed D1 solicitor that: D1 shall pay RM20,000 for the month of July 2021 for plaintiff to hold the winding up proceeding. Following payments of RM100,000 per month starting from August 2021. The plaintiff shall withdraw winding up proceeding once the first payment of RM20,000.00 and two installments for RM200,000.00 are cleared.	Encl. 70 Exh DBD-5
9.	26.07.2021	D1 solicitor sent a letter to plaintiff enclosing postdated cheque of RM100.000.00 each	Encl. 70 Exh DBD-6
10.	03.08.2021	D1 made payment of RM20,000.00 to the plaintiff	Encl. 70 Exh DBD-2
11.	8.10.2021	D1 made payment of RM30,000.00 to the plaintiff	Encl. 70 Exh DBD-2
12.	31.10.2021	D1 solicitor sent a letter to plaintiff requesting to reduce the installment to RM30,000.00	Encl. 70 Exh. DBD-7
13.	05.11.2021	plaintiff informed D1 solicitor that plaintiff are not agreeable to reduce the monthly installment from RM100,000.00 to RM30,000.00	Encl. 70 Exh DBD-8
14.	11.11.2021	D1 made payment of RM30,000.00 to the plaintiff	Encl. 70 Exh DBD-2
15.	28.02.2022	D1 wound up by third party	Encl. 25 Exh SME-4
16.	24.08.2022	plaintiff initiated Garnishee Proceeding against D2-D5	-
17.	21.12.2022	Absolute Order obtained	Encl. 25 Exh SME-5
18.	15.03.2023	Garnishee amount received totaling to RM31.486.19	Encl. 70 Exh DBD-2
19.	15.03.2023	6 years have lapsed for the Consent Judgment	
20.	12.04.2023	Plaintiff filed Encl. 24	

[11] The plaintiff argues that they have satisfied the condition of O. 46 r. 3(2) of the Rules by:

(i) identifying the consent judgment and stating the amount originally due thereunder (exh SME-1 of encl. 25);

(ii) stating the amount due under the said consent judgment as at the date of the application (p. 3 of encl. 25); and

(iii) stating the reasons for the delay in enforcing the consent judgment (pp. 7-12 of encl. 25 & pp. 9-16 of encl. 70).

[12] The case of *Public Bank Bhd v. Seato Trading (M) Sdn Bhd & Ors* [1995] CLJU 326; [1995] 1 LNS 326; [1996] 1 MLJ 165 is relied by the plaintiff to argue that it was proper for them not to issue execution when D1 was making payments; and therefore, such settlement arrangement could be tendered as a valid excuse for the delay which occurred.

[13] The case of *Bank Kerjasama Rakyat Malaysia Bhd v. Pertama Perdagangan Sdn Bhd & Ors* [2019] 1 LNS 1784 is relied to support the plaintiffs' argument that the fact that execution proceedings were commenced prior to the expiry of the six-year period shows that they had never slept on their rights. In the case of *Bank Kerjasama Rakyat Malaysia Bhd v. Pertama Perdagangan Sdn Bhd & Ors* (*supra*), the High Court held that the appellant had shown that they had started execution proceedings against D2, D3 & D4 within six years of obtaining the judgment. By taking such action, the appellant cannot be said to have slept on their rights.

[14] The case of *Malayan Banking Bhd v. Chong Hin Trading Co Sdn Bhd & Ors* [2012] 3 CLJ 499; [2013] 3 MLJ 299 is also relied by the plaintiff to argue that the plaintiff should not be denied from enjoying the fruits of litigation when, in fact, the plaintiff was being considerate towards the defendants in terms of delaying the execution of judgment to give leeway and latitude to enable the defendants to settle the outstanding sum. Such leeway and latitude should not be taken as a license to now lambast the plaintiff for laches and limitations.

[15] The Federal Court's decision in *Tio Chee Hing v. Chung Khiaw Bank Ltd* [1981] 1 MLJ 227 is also relied by the plaintiff in arguing that negotiations which took place between the plaintiff and D1 are sufficient reasons for this court to take into account in deciding whether there has been a delay and to justify the granting of leave to execute a judgment beyond the six-year period after the same was obtained. The Court of Appeal's decision in *Moez Ali Akbarally & Anor v. Public Bank Bhd* [2021] 8 CLJ 20 is also cited to argue that the court can allow further extension in the event the initial one-year period expires; this is provided that sufficient reasons for the subsequent delay is furnished.

[16] Learned counsel for the defendants, Liew Teck Huat, argues that the plaintiff failed to execute expeditiously; wherein there is unexplained delay on their part. What appeared in the plaintiff's affidavit in support of encl. 24 is argued to be mere chronology of events without cogent explanation of the delay. Further to the six years which has lapsed on 15 March 2023, the defendant argues that it took the plaintiff another seven months to file the application of leave.

[17] The defendants cited the case of *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396; [1996] 1 MLJ 223, where it is contended that the plaintiff's conduct bore resemblance to that of an indolent litigant. In that case the Court of Appeal, as articulated by Gopal Sri Ram JCA (as he then was), held at p. 229:

> It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim *vigilantibus, non dormientibus, jura subveniunt*, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable *ex debito justitiae*, a court may refuse relief to an indolent litigant.
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> In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case. And in a matter which involves the exercise of discretion, it is for the judge in whom the primarily vests the discretion.

[18] The defendants further relied on the case of *CIMB Bank Bhd v. Teratai Sanjung (M) Sdn Bhd & Anor* [2019] CLJU 1328; [2019] 1 LNS 1328; [2020] 1 MLJ 249 to argue that what was offered by the plaintiff in their affidavit in support amounts to mere chronology which cannot be accepted as an explanation of the delay. It is argued that the Court of Appeal in *CIMB Bank Bhd v. Teratai Sanjung (M) Sdn Bhd & Anor* (*supra*) expounded the rationale of O. 46 r. 2(1)(a) that any judgment must be "fully completed within six years unless the party who had obtained judgment provides valid reason(s) for not doing so within that period".

[19] The case of *Pacific Sanctuary Holdings Sdn Bhd v. Masaland Construction Sdn Bhd* [2020] 4 CLJ 490; [2020] 3 MLJ 692, is referred wherein the following passage is quoted to highlight the importance of disclosing sufficient reasons for the delay:

> [19] In *Affin Bank Bhd v. Wan Abdul Rahman Wan Ibrahim* [2003] 2 MLJ 509; [2003] 1 CLJ 826 where the appellant as the plaintiff in the court below applied pursuant to O. 46 r. 2(1) of the old Rules of the High Court 1980 (in *pari materia* with O. 46 r. 2(1) of the ROC 2012) for leave to commence execution proceedings against the defendant after six years had lapsed from the date of judgment. The application was dismissed by

the trial judge on the basis that the appellant failed to furnish cogent and acceptable reasons for the grant of leave. In dismissing the plaintiff's appeal, this court through Arifin Zakaria JCA (as he then was) stated that:

> It is trite that the grant of leave under O. 46 r. 2 is in the court's discretion. Order 46 r. 3 states that an application under O. 46 r. 2(1) must be supported by and affidavit stating, when the case falls within r. 2(1)(a), the reasons for the delay in enforcing the judgment or order. Therefore, it is incumbent upon the applicant to furnish the court with sufficient reason in support of such an application. What is sufficient reason? This naturally will vary from case to case. It is not possible for this court to provide an exhaustive list of what is considered to be sufficient reason.
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> [20] We had perused the affidavit in support of the plaintiffs leave application at pp. 19-22 of the appeal record Part B and we could not find any explanation as to the reasons for the delay in enforcing the judgments and/or order offered by the plaintiff. On this ground alone, in our view, there was sufficient ground for the learned JC to decline to exercising his discretion to grant leave to the plaintiff to proceed with the execution against the defendant. Since there was no explanation given by the plaintiff for the delay, it is thus clear that the plaintiff has failed to satisfy the requirements stipulated under O. 46 r. 3 of the ROC 2012.

Analysis Of The Law

[20] The primary issue that arises for consideration is the construction of O. 46 r. 2(1)(a) of the Rules. In this context, it is necessary to examine the purpose and object of O. 46 r. 2(1)(a) of the Rules. Although the plaintiff has 12 years to bring 'an action upon any judgment', by virtue of s. 6(3) of Limitation Act 1953 the period in which they are allowed to 'execute' is limited up to six years unless leave is obtained pursuant to O. 46 r. 2(1)(a) of the Rules.

[21] Chong Joo Tian in his article titled limitation period for the enforcement of judgment: Whether the House of Lords Decision in *Lowslev Should be followed in Malaysia* [1999] 1 MLJ 1 xvii argues that the definition of "action" in s. 2(1) of the Limitation Act 1953 is wide enough "cover a fresh action upon a judgment as well as an action by way of execution of a judgment". As such, s. 6(3) and s. 2(1) of Limitation Act 1953 should be read together to include both a fresh action on a judgment as well as execution proceedings on a judgment.

[22] Sujata Balan in her article "*The Limitation Period for Actions upon a Judgment and Execution Proceedings in Malaysia*" (Journal of Malaysian and Comparative Law (39 JMCL) pp. 77 to 90) cited the *dicta* of Hashim Yeop Sani CJ in *Fong Tak Sing v. Credit Corporation (M) Bhd* [1991] 1 MLJ 409, pp. 414 to 414 and Best CJ in *A 'Court v. Cross* [8231] 3 Bing 329 and stated as follows:

The law of limitation is promulgated for the primary object of discouraging litigants from 'sleeping' on their actions and more importantly, to have an encl. to litigation. It is based on two broad considerations. First the presumption that a right not exercised for a long time is non-existent. The Second consideration is that it is necessary that a legal right should not be left too long in a state of uncertainty, doubt or suspense.

[23] By the terms of O. 46 r. 2(1)(a) and r. 2(3) of the Rules an initial extension of one year may be granted by this court provided the plaintiff could offer valid and sufficient reason/s for such delay:

When leave to issue any writ of execution is necessary (O. 46, r. 2)

2. (1) A writ of execution to enforce a judgment or order may not be issued without the leave of the Court in the following cases:

(a) where six years or more have lapsed since the date of the judgment or order;

(3) Where the Court grants leave, whether under this rule or otherwise, for the issue of a writ of execution and the writ is not issued within one year after the date of the order granting such leave, the order shall cease to have effect, without prejudice, however, to the making of a fresh order.

[24] As set out in O. 46 r. 3(2) of the Rules, the manner in which this court may exercise its discretion is upon being satisfied that the following pre-conditions have been met:

Application for leave to issue writ (O. 46 r. 3)

3. (1) An application for leave to issue a writ of execution may be made ex parte by a notice of application in Form 88.

(2) Such an application shall be supported by an affidavit:

(a) identifying the judgment or order to which the application relates and, if the judgment or order is for the payment of money, stating the amount originally due thereunder and the amount due thereunder at the date of the application;

(b) stating, where the case falls within rule 2(1)(a), the reasons for the delay in enforcing the judgment or order;

(c) stating, where the case falls within rule 2(1)(b), the change which has taken place in the parties entitled or liable to execution since the date of the judgment or order;

(d) stating, where the case falls within rule 2(1)(c) or (d), that a demand to satisfy the judgment or order was made on the person liable to satisfy it and that he has refused or failed to do so; and

(e) giving such other information as is necessary to satisfy the Court that the applicant is entitled to proceed to execution on the judgment or order in question and that the person against whom it is sought to issue execution is liable to execution on it.

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(3) The Court hearing such application may grant leave in accordance with the application or may order that any issue or question, a decision on which is necessary to determine the rights of the parties, be tried in any manner in which any question of fact or law arising in an action may be tried and, in either case, may impose such terms as to costs or otherwise as it thinks just.

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[25] At the outset, based on the Federal Court's decision in *Dr Shamsul Bahar Abdul Kadir & Another Appeal v. RHB Bank Bhd* [2015] 4 CLJ 561; [2015] 4 MLJ 1, before the plaintiff can issue bankruptcy proceedings, they are required to obtain leave to execute upon expiry of the six-year period. This legal prerequisite exists because, before filing the necessary bankruptcy notices, the plaintiff must be in the position to levy immediate execution on all the necessary defendants based on the consent judgment. It is clear from the plaintiff's application in encl. 24 that this was their intended action against D2 to D5.

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[26] In the case of *A 'Court v. Cross* (*supra*), Best CJ eloquently elucidated the jurisprudential rationale behind the imposition of time limits on specific causes of action, referencing the English *Statute of Limitations of 1623* enacted during the reign of King James I (r. 1603-1625):

> It is, as I often heard it called by great judges, an Act of peace. Long dormant claims have more of cruelty than of justice in them.

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[27] Considering this perspective, my discretion would be guided by the following question: Would the grant of the required leave to execute result in the perpetuation of a dormant claim that have more of cruelty than of justice? Based on this, the critical matter to be examined is thus whether from the time the said consent judgment was entered, the plaintiff was indolent and just slept on their rights and did nothing, or whether they took active steps to recover the judgment sum by way of any execution or other proceedings.

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[28] As the consent judgment was entered on 16 March 2017, the six-year period limited by O. 46 r. 2(1)(a) of the Rules for the plaintiff to complete execution ended on 15 March 2023. By filing the application for leave on 12 April 2023, the plaintiff was late by 28 days (measured from 16 March 2023), and not seven months as claimed by the defendants' counsel.

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[29] Had the defendants adhered to the agreed-upon monthly instalments of RM300,000, the debt would have been cleared within 19 months, specifically by 16 October 2018. It is also an indisputable fact that D1 was negotiating a reduced instalment and ultimately paid about 30% of the consent judgment sum before it was wound up in February 2022. Should the plaintiff be penalised for agreeing to an extension of time and consenting to reduced instalments? I do not think so as such stance would run counter to public policy of encouraging mediation and out-of-court settlement. Moreover, based on the facilities granted, the plaintiff reserved their contractual right to restructure the method and quantum of payment without affecting or waiving their rights under the facilities.

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[30] The impact of the COVID-19 pandemic can be judicially noticed, (see: *Public Islamic Bank Bhd v. Fadhil Husseiin Ishak Yassin Mansor; MS Citajaya Sdn Bhd (Proposed Intervener)* [2023] 3 CLJ 102; [2023] 2 MLRH 873 and *Tamileswaaran Ravi Kumar v. Election Commission Of Malaysia & Anor* [2023] 5 CLJ 983; [2023] MLRHU 623. I thus take judicial notice of the COVID-19 and the imposition of the Movement Control Order ('MCO'), Conditional Movement Control Order ('CMCO') and Recovery Movement Control Order ('RMCO') which may have induced banks and financial institutions, including the plaintiff, to exercise greater leniency in terms of loan installment or any repayment obligation. This MCO period also resulted in the extension of the statutory notice from the usual 21-day period to six months as per Companies (Exemption) (No. 2) Order 2020, which eventually resulted in the delay in the winding-up process initiated by the plaintiff against D1 *via* statutory notice dated 25 June 2020. This enlargement of time was catered for notices issued between the period of 23 April 2020 till 31 December 2020 ('the window period'). Whilst it is pertinent to note that the period for MCO started on 18 March 2020, followed by CMCO, and ended with RMCO on 31 May 2021.

[31] Therefore, I agree with the plaintiff's argument, drawing parallels to the precedent set in *Bank Keriasama Rakvat Malaysia Berhad v Pertama Perdaqanqan Sdn Bhd & Ors* (*supra*) and *Malayan Banking Bhd v. Chong Hin Trading Co Sdn Bhd & Ors* (*supra*). Essentially, disallowing the plaintiff to enforce the consent judgment against D2 to D5 would not only unjustly deprive the plaintiff of their rightful recourse but would also enable the defendants to exploit the plaintiff's generosity and leniency. The defendants have clearly benefited from the terms of the consent judgment and the subsequently reduced instalment payments, yet they are now attempting to evade their obligations and responsibilities.

[32] I am further bound by the principle of stare decisis to apply the Federal Court's decision in *Tio Chee Hing v. Chung Khiaw Bank Ltd* (*supra*) which held that the negotiations which took place between the plaintiff and D1 are sufficient reasons for delay which would justify this court to grant leave to execute as prayed by the plaintiff.

[33] On the issue of prejudice, I believe there is none as the guarantors' debt (D2 to D5's debt) have been reduced during the process of extended payment terms which were more favourable than the agreed terms within the four corners of the consent judgment. The plaintiff's claim for interest on judgment sum would also be limited up till the first six years based on s. 6(3) of the Limitation Act 1953. Ultimately, there is no change in the position of D2 to D5 as they remain jointly and severally liable under the guarantee despite the winding up of D1.

[34] Much time was devoted by learned counsel of the defendants to emphasize on the absence of reasons for making the application. It is argued by the defendants that the initial affidavit in support, *ie*, encl. 25, lacks particulars on the delay wherein most of the particulars were subsequently included in encl. 70. During the setting aside of the initial extension order, the counsel of the defendants did argue against the rehearing of encl. 24. Nevertheless, based on the nature of the application, which the plaintiff intended to be heard *inter parte*, I believe that it should be reheard on its merits wherein this would entail the opportunity for the defendants to file their affidavit in opposition, and the plaintiff having equal right to an affidavit in reply. In doing so, the plaintiff is entitled to add further reasons for the delay wherein the defendant is equally entitled to ask for leave to reply in the event they find the need to do so.

[35] I believe that this approach is in line with the spirit of O. 46 r. 3(3) of the Rules which allows me to order any issue or question, a decision on which is necessary to determine the rights of the parties, be tried in any manner in which any question or law arising therein may be tried. The direction for a rehearing *via* affidavit evidence upon setting aside the initial extension order of the Senior Assistant Registrar is a cost-effective way to carefully determine the rights of the parties herein.

[36] The case relied by the defendants namely *CIMB Bank Bhd v Teratai Sanjung (M) Sdn Bhd & Anor* (*supra*) is distinguished herein. In the said case, although a consent judgment was entered, there was no negotiation towards a reduced quantum of instalments. In our case, the plaintiff actively monitored DTs repayment and subsequently agreed to DTs request for more manageable and extended repayment terms, including palatable instalments.

[37] Further the case of *Pacific Sanctuary Holdings Sdn Bhd (formerly known as Ideal Prestige Sdn Bhd) v. Masaland Construction Sdn Bhd* (*supra*) relied by the defendants can be distinguished with the facts herein. In that case, the judgment was a default judgment which was rendered otiose upon the entry of a settlement agreement. Thus, further to the finding of lack of explanation of delay, the Court of Appeal is correct in dismissing the plaintiff's application to execute the default judgment when it is clear that their legal recourse was to enforce the settlement agreement.

[38] Contrary to the defendants' allegation, it is not true to say that the plaintiff had not taken any action upon obtaining the consent judgment in 2017. In actual fact, upon discovering that the defendants were not adhering to the renegotiated instalments, the plaintiff took steps to enforce the same through winding-up and garnishee proceedings, *albeit* unsuccessfully. However, since the 2017 consent judgment remains valid until 2029 based on s. 6(3) of Limitation Act 1953, the plaintiff unquestionably retained the right to seek formal leave for its execution.

[39] Based on this finding, I am satisfied that the plaintiff has complied with the provisions of O. 46 r. 3 of the Rules. In making the application, the plaintiff has provided reasonable explanations, and has shown circumstances in those explanations, and has never at any material time waived or relinquished their right to proceed with the execution of the consent judgment.

Decision

[40] After considering the submissions and examining the affidavit evidence filed herein, I am of the view that the plaintiff has sufficiently demonstrated that leave should be granted pursuant to O. 46 r. 2(1)(a) of the Rules.

[41] For the reasons above, I allow the application by the plaintiff in encl. 24 with no order as to costs.